



FAMILY LAW SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (FL-2007-11) AMENDMENTS TO FAMILY CODE §2337- ESTATE PLANNING DURING DISSOLUTION

TO: Larry Doyle, Chief Legislative Counsel, State Bar Office of Governmental Affairs

FROM: Ann Fallon

DATE: August 31, 2006

RE: Amendments to Family Code §2337 – Estate Planning During Dissolution

SECTION ACTION AND CONTACTS:

Date of Approval by Section Executive Committee: April 8, 2006

Approval vote: Unanimous

Committee Contact:

Ann Fallon
Whiting Fallon & Ross
1500 Newell Ave., 5th Floor
Walnut Creek, CA 94596
(925) 296-6000
Fax: (925) 296-6001
af@disso.com

Flexcom Legislative Chair:

Elizabeth L. Harrison
451 Main Street, #9
Placerville, CA 95667
Telephone: (530) 621-4700
Fax: (530) 642-2761
elh-family-law@comcast.net

DIGEST:

Makes technical, updating corrections to Family Code §2337 to improve its interaction with related provisions of the Family and Probate Codes and the Employee Retirement Income Security Act of 1974, as amended (ERISA).

PURPOSE:

Under existing law (Family Code §2337 and related statutes), in a proceeding for dissolution of marriage, the court, upon noticed motion, may sever and grant an early and separate trial on

the issue of the dissolution of the status of the marriage apart from other issues. Existing law offers various indemnity provisions to protect the community property interest when married persons terminate their marital status prior to the division of their property. This bill updates Family Code 2337 with respect to AB 873 (Harman), Chapter 417, Statutes of 2001, developed by the [California Law Revision Commission](#) (CLRC) and sponsored by the Trusts & Estates Section of the State Bar, which amended Probate Code section 5600 to provide that dissolution or annulment of marriage would cancel the designation of the now-former spouse as the beneficiary of a nonprobate transfer, absent clear and convincing evidence that the transferor intended to preserve the nonprobate transfer in favor of his or her former spouse or an order of the court. This bill would amend Family Code section 2337(c)(7) to explain that the court may make an order pursuant to Probate Code §5600(b)(3), where appropriate, that a party maintain a beneficiary designation for a spouse (or domestic partner) for up to one-half or, upon a showing of good cause, for all of a non-probate transfer asset until judgment has been entered with respect to the community ownership of that asset, and until the other party's interest therein has been distributed to him or her. The amendment clarifies that an order of the court made pursuant to Family Code section 2337(c)(7) shall apply to non-probate transfers described in Probate Code Section 5000 only if created by either party or acquired with the income or assets of either party, and with respect to trusts, absent a showing of good cause, shall only apply to revocable trusts of which either party is a grantor and only to powers of appointment under an instrument created by either party and/or of which either party is a grantor regardless whether such trust is revocable or irrevocable. This bill further clarifies that the ability of the court to make such an order is not intended to supercede any other section of the Probate Code.

This bill would go beyond an order maintaining a former spouse as a beneficiary under an Individual Retirement Account or Annuity and allow the court to make an order dividing such non-probate transfer assets in order to preserve the ability of the party to defer the distribution of the Individual Retirement Account or Annuity ("IRA") established under section 408 or 408A of the Internal Revenue Code of 1986, as amended, ("IRC") on the death of the other party.

This bill would further allow a security instrument to be required upon a showing that circumstances exist that would place a substantial burden of enforcement of either party's community property rights or which would eliminate the ability of the surviving party to enforce his or her community property rights if the other party died before the division and distribution or compliance with any court ordered payment of any community property interest therein. Such instruments would include an order that the party provide an undertaking, or an order to provide a security interest by QDRO from that party's share of a retirement plan(s), or an order for the creation of a trust as defined in Probate Code section 82(a)(2) or an order for such other arrangements as may be reasonably necessary and feasible to provide appropriate security in the event of the party's death before judgment has been entered with respect to the community ownership of that asset, and until the other party's interest therein has been distributed to him or her.

AB 873 also clarified that various estate planning changes that do not affect a party's property interest may be made during a dissolution proceeding. This concept is incorporated into the amendments to Family Code section 2337 by clarifying that an order to retain a former

spouse as a beneficiary to a non probate transfer asset would apply only to 50% of the asset, except upon a showing of good cause.

Under existing law, the court may require that a party's retirement plan be joined and, if appropriate, an order for division of retirement be entered. This bill takes into consideration that California Probate Code section 5600 is pre-empted by ERISA and thereby would mandate that prior to or simultaneously with entry of judgment terminating status, the party's retirement or pension plan(s) shall be joined as a party to the proceeding for dissolution, unless the plan is subject to Title 1 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") in which case form language is provided for the Judgment if no other order is entered dividing that asset; further to preserve the claims of each spouse in all retirement plan benefits upon entry of a Judgment of Status Dissolution, the court shall either enter (1) an full and permanent order under Family Code section 2610 or (2) an interim order preserving survivor benefit rights, or (2) insert form language into the Judgment protecting retirement and survivor benefit rights in general, subject to a later order. A copy of any order created including the Judgment of Status Dissolution, shall be promptly served by the moving party on the Retirement or Pension Plan Administrator.

DOCUMENTATION: None.

HISTORY: See AB 873 (Harman), Chapter 417, Statutes of 2001, and the California Law Revision Commission project ([Estate Planning During Marital Dissolution](#) (10/15/2000)) .

PENDING LITIGATION: None.

FISCAL IMPACT: None.

GERMANENESS: Issues relating to the rights and interests of persons in dissolution proceedings are within the specialized expertise and training of the members of the Family Law Section, and the executive committee thereof.

TEXT OF LEGISLATION

SECTION 1. Section 2337 of the Family Code is amended to read:

2337. (a) In a proceeding for dissolution of marriage, the court, upon noticed motion, may sever and grant an early and separate trial on the issue of the dissolution of the status of the marriage apart from other issues.

(b) A preliminary declaration of disclosure with a completed schedule of assets and debts shall be served on the nonmoving party with the noticed motion unless it has been served previously, or unless the parties stipulate in writing to defer service of the preliminary declaration of disclosure until a later time.

(c) The court may impose upon ~~a~~ *the moving party* any of the following conditions on granting a severance of the issue of the dissolution of the status of the marriage, ~~and in case of that party's death, an order of any of the following conditions continues to be binding upon that party's estate~~ *which conditions shall survive that party's death. The court may impose some or*

all of the following conditions on the non-moving party if considerations of justice and fairness require, taking into account the burden of compliance.

(1) The party shall indemnify and hold the other party harmless from any taxes, reassessments, interest, and penalties payable by the other party ~~if the dissolution of the marriage before the division of the parties' community estate results in a taxable event to either of the parties by reason of the ultimate division of their community estate, which taxes would not have been payable in connection with the division of the community estate that would not have been payable~~ if the parties were still married at the time the division was made.

(2) Until judgment has been entered on all remaining issues and has become final, the party shall maintain all existing health and medical insurance coverage for the other party and ~~the any~~ minor children as named dependents, so long as the party is ~~legally able~~ *eligible* to do so. ~~At the time the party is no longer legally eligible to maintain the other party as a named dependent under the existing health and medical policies, the party or the party's estate shall, at the party's sole expense, purchase and maintain health and medical insurance coverage that is comparable to the existing health and medical insurance coverage. If at any time during this period the party is not eligible to maintain such coverage, the party shall, at the party's sole expense, provide and maintain health and medical insurance coverage that is comparable to the existing health and medical insurance coverage to the extent such is available. If comparable insurance coverage is not obtained, the party or the party's estate is responsible for the health and medical expenses incurred by the other party that would have been covered by the insurance coverage, and shall indemnify and hold the other party harmless from any adverse consequences resulting from the lack of insurance. To the extent such coverage is not available, the party shall be responsible to pay, and shall demonstrate to the court's satisfaction the ability to pay, for the health and medical care for the other party and the minor children, to the extent such care would have been covered by the existing insurance coverage but for the dissolution of marital status, and shall otherwise indemnify and hold the other party harmless from any adverse consequences resulting from the loss or reduction of the existing coverage. For purposes of this subsection "health and medical insurance coverage" shall include any coverage for which the parties are eligible under any group or individual health or other medical plan, fund, policy or program.~~

(3) Until judgment has been entered on all remaining issues and has become final, the party shall indemnify and hold the other party harmless from any adverse consequences ~~resulting to~~ the other party if the bifurcation results in a termination of the other party's right to a probate homestead in the residence in which the other party resides at the time the severance is granted.

(4) Until judgment has been entered on all remaining issues and has become final, the party shall indemnify and hold the other party harmless from any adverse consequences ~~resulting to~~ the other party if the bifurcation results in the loss of the rights of the other party to a probate family allowance as the surviving spouse of the party.

(5) Until judgment has been entered on all remaining issues and has become final, the party shall indemnify and hold the other party harmless from any adverse consequences ~~resulting to~~ the other party if the bifurcation results in the loss of the other party's rights ~~to pension benefits, elections, or survivors' benefits under the party's pension or retirement plan~~ *with respect to any retirement, survivor or deferred compensation benefits under any plan, fund or arrangement, or to any elections or options associated therewith*, to the extent that the other party would have been entitled to those benefits or elections as the *spouse or* surviving spouse of the party.

~~(6) Prior to entry of judgment terminating status, both of the following shall occur:~~

~~(A) The party's retirement or pension plan shall be joined as a party to the proceeding for dissolution.~~

~~(B) If applicable, an order pursuant to Section 2610 shall be entered with reference to the defined benefit or similar plan pending the ultimate resolution of the distribution of benefits under the employee benefit plan.~~

~~(7)-(6)~~ The party shall indemnify and hold the other party harmless from any adverse consequences if the bifurcation results in the loss of rights to social security benefits or elections to the extent the other party would have been entitled to those benefits or elections as the surviving spouse of the party.

(7) The court may make an order pursuant to Probate Code §5600(b)(3), where appropriate, that a party maintain a beneficiary designation for a spouse (or domestic partner) for up to one-half or, upon a showing of good cause, for all of a non-probate transfer asset until judgment has been entered with respect to the community ownership of that asset, and until the other party's interest therein has been distributed to him or her.

(i) This subdivision (c)(7) shall apply with respect to the non-probate transfers described in Probate Code Section 5000 which were created by either party or which were acquired with the income or assets of either party. With respect to trusts, absent a showing of good cause, this provision shall only apply with respect to revocable trusts of which either party is a grantor and also shall only apply to powers of appointment under an instrument created by either party and/or of which either party is a grantor regardless whether such trust is revocable or irrevocable.

(ii) Except upon a showing of good cause, this subdivision (c)(7) shall not apply with respect to the non-probate transfers described in Probate Code section 5000 which were acquired by either party by gift, descent or devise, and also shall not apply to powers of appointment under an instrument not created by either party and/or of which neither party is a grantor nor to the execution and to the filing of a disclaimer pursuant to Part 8 (commencing with Section 260) of Division 2 of the Probate Code nor to an appointment of a party as a trustee.

(iii) This subdivision (c)(7) is not intended to supercede any other section of the Probate Code.

(8) In order to preserve the ability of the party to defer the distribution of the Individual Retirement Account or Annuity ("IRA") established under section 408 or 408A of the Internal Revenue Code of 1986, as amended, ("IRC") on the death of the other party, the court may require that one-half (or all upon a showing of good cause) of the community interest in any such IRA, by or for the benefit of the party be assigned and transferred to the other party pursuant to IRC section 408(d)(6). Notwithstanding the foregoing, nothing in this subdivision (c)(8) shall limit the power granted pursuant to section (g) hereof.

(9) Upon a showing that circumstances exist that would place a substantial burden of enforcement of either party's community property rights or which would eliminate the ability of the surviving party to enforce his or her community property rights if the other party died before the division and distribution or compliance with any court ordered payment of any community property interest therein (including but not limited to a situation where pre-emption under Federal law applies to an asset of a party, or purchase by a bona fide purchaser has occurred), the Court may order a specific security interest designed to reduce or eliminate the likelihood that any such post-mortem enforcement proceeding(s) would be ineffective or unduly

burdensome to the surviving party. For this purpose, such orders may include, but are not limited to:

(i) an order that the party provide an undertaking, or an order to provide a security interest by QDRO from that party's share of a retirement plan(s), or an order for the creation of a trust as defined in Probate Code section 82(a)(2),

(ii) or an order for such other arrangements as may be reasonably necessary and feasible to provide appropriate security in the event of the party's death before judgment has been entered with respect to the community ownership of that asset, and until the other party's interest therein has been distributed to him or her.

(iii) In the case of a retirement plan not subject to an enforceable court order for the payment of spousal survivor benefits to the other party, an interim order requiring the moving party to pay or cause to be paid, and to post adequate security for such payment, any survivor benefit that would have been payable to the other party on the death of the moving party but for the Judgment of Status Dissolution, pending entry of Judgment on all remaining issues

(8)(10) Any other condition the court determines is just and equitable.

(d) ~~A judgment granting a dissolution of the status of the marriage shall expressly reserve jurisdiction for later determination of all other pending issues. Prior to or simultaneously with entry of judgment terminating status, all of the following shall occur:~~

(1) The party's retirement or pension plan(s) shall be joined as a party to the proceeding for dissolution, provided the plan is not subject to Title 1 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). For plans subject to Title 1 of ERISA (except in the case of the dissolution of a domestic partnership), if no order is entered under (d)(2)(i) or (ii), then the proposed Judgment of status dissolution shall include under item 4p "Other" the provision set forth in (d)(3)(iii) below.

(2) To preserve the claims of each spouse in all retirement plan benefits upon entry of a Judgment of Status Dissolution, , the court shall enter one of the following in connection with the Judgment of Status Dissolution for each retirement plan in which either party is a participant:

(i) An order pursuant to Section 2610 disposing of each party's interest in retirement plan benefits, including survivor and death benefits; or

(ii) An interim order preserving the non-employee party's right to retirement plan benefits, including survivor and death benefits, pending entry of Judgment on all remaining issues; or,

(iii) The Judgment of Status Dissolution with item 4p "Other," completed as follows:

*EACH PARTY (insert party names and addresses) IS
PROVISIONALLY AWARDED WITHOUT PREJUDICE AND
SUBJECT TO ADJUSTMENT BY SUBSEQUENT DOMESTIC
RELATIONS ORDER, A SEPARATE INTEREST EQUAL TO
ONE-HALF OF ALL BENEFITS ACCRUED OR TO BE
ACCRUED UNDER THE PLAN (it is important to name each plan
individually) AS A RESULT OF EMPLOYMENT OF THE OTHER
PARTY DURING THE MARRIAGE/DOMESTIC PARTNERSHIP
AND PRIOR TO THE DATE OF SEPARATION. IN ADDITION,
PENDING FURTHER NOTICE, THE PLAN SHALL, AS
ALLOWED BY LAW, CONTINUE TO TREAT THE PARTIES AS
MARRIED/DOMESTIC PARTNERS FOR PURPOSES OF ANY*

SURVIVOR RIGHTS/BENEFITS AVAILABLE UNDER THE PLAN TO THE EXTENT NECESSARY TO PROVIDE FOR PAYMENT OF AN AMOUNT EQUAL TO THAT SEPARATE INTEREST OR FOR ALL OF SUCH SURVIVOR BENEFIT IF AT THE TIME OF THE DEATH OF THE PARTICIPANT, THERE IS NO OTHER ELIGIBLE RECIPIENT OF SUCH SURVIVOR BENEFIT.

(e) A copy of any order created under subsection d (2) above, including the Judgment of Status Dissolution, shall be promptly served by the moving party on the Retirement or Pension Plan Administrator.

(f) A judgment granting a dissolution of the status of the marriage shall expressly reserve jurisdiction for later determination of all other pending issues.

(e)(g) If the party dies after the entry of judgment granting a dissolution of marriage, any obligation imposed by this section shall be enforceable against any asset, including the proceeds thereof, against which these obligations would have been enforceable prior to the person's death.